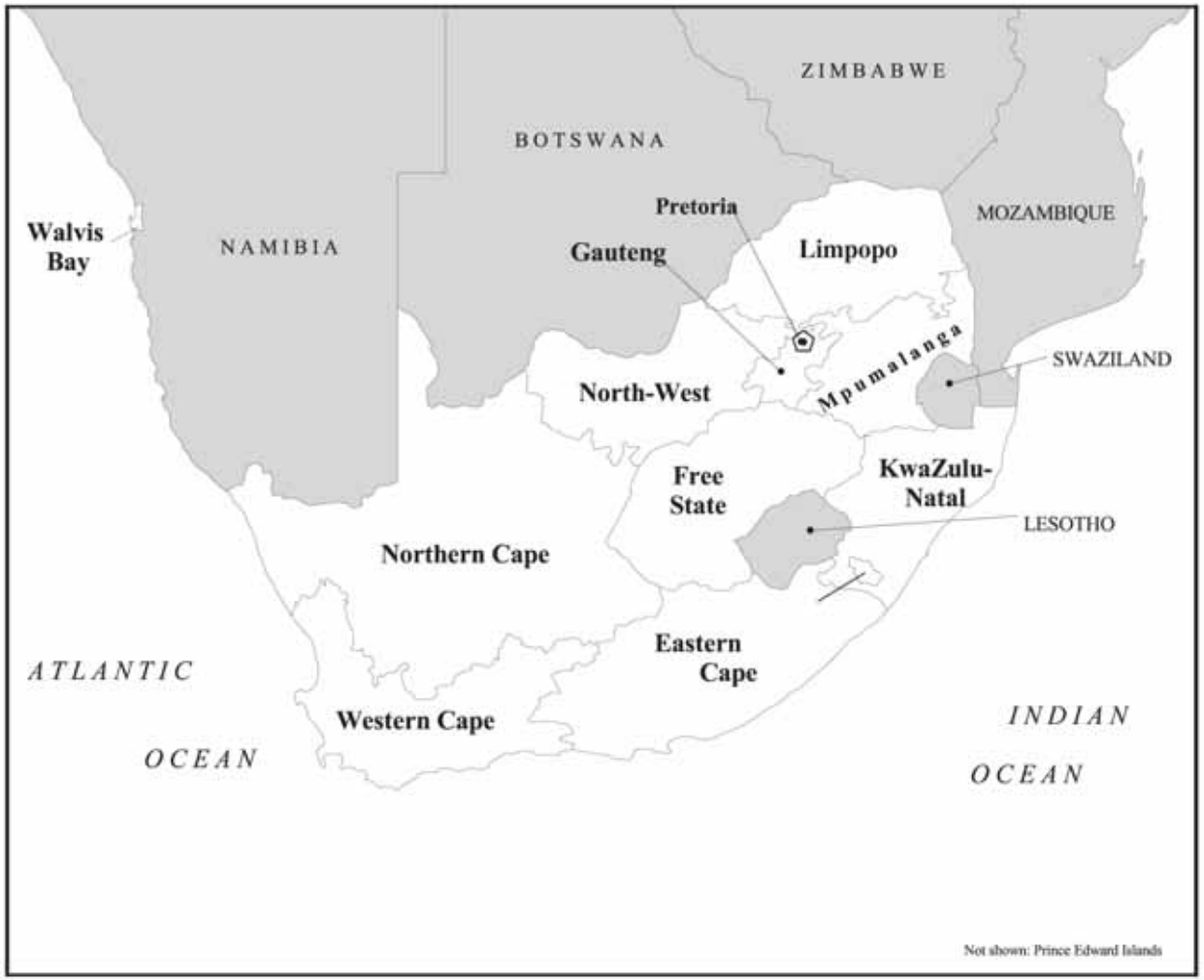

Republic of South Africa

Capital: Pretoria
Population: 43.5 Million
(2002 est.)

Boundaries and place names are representative only and do not imply official endorsement.

Sources: CIA World Factbook; ESRI Ltd; Times Atlas of the World; UN Cartographic Dept.

South Africa
(Republic of South Africa)

JANIS VAN DER WESTHUIZEN

1 HISTORY AND DEVELOPMENT OF FEDERALISM

South Africa is located at the very southern tip of the African continent and dominates the southern African region. Namibia, Botswana, Zimbabwe and Mozambique are its immediate neighbours, whilst South Africa entirely surrounds Swaziland and Lesotho. The country occupies 1,219,090 km², and is inhabited by approximately 43 million people. As of the 1990s, the population was approximately 75.2% black, 13.6% white, 8.6% coloured and 2.6% Indian. Federalism has had a highly contested reception in South Africa and this continues to be so, given its historically deeply divided polity.

Four British territories – the Cape Colony and Natal (formerly under British control) and the Boer Republics of the Transvaal and the Orange Free State – were merged under the *South Africa Act* passed by the British Parliament in 1909. In May 1910 South Africa became a self-governing dominion within the British Commonwealth. The Union was a historic compromise: Afrikaners felt it meant greater independence and weakened British imperial influence, while the British saw the Union as consolidating British influence. Initially, the 1910 Union of South Africa explicitly rejected any federalist pretensions. At that time, the Union, celebrated as the reconciliation between Afrikaner and British interests, overshadowed white/black race relations. In fact, the process of creating the Union facilitated a protracted attack against the political rights of black and "coloured"

South Africans. Although the Union began reconciling Afrikaner and British interests, it failed to unite South Africa, given that the black majority was excluded from political participation – the issue which subsequently shaped South African history until the 1990s.

With the advent of the apartheid state in the 1950s, power was increasingly centralized with the four provinces of the Transvaal, Orange Free State, Natal and Cape existing as administrative units of (white) South Africa proper. The "bantustans," or ethnic homelands, were in effect treated as constitutional annexes or adjuncts consisting of four nominally "independent states" of Bophutswana, Venda, Ciskei and Transkei as well as six "self-governing territories." These entities stood at the heart of so-called "grand apartheid," for it was through these territories constituted along tribal lines that black South Africans were supposed to exercise their civil and voting rights. In effect, it meant that they enjoyed little more than "sojourner" status as *gastarbeiter* (guest workers) in 'white' South Africa. Hand-in-hand with grand apartheid, stood "petty apartheid" which was a vast network of state control through which virtually every conceivable aspect of daily life between South Africans of different races was segregated, including transport, residential areas, universities, shop entrances, public amenities, and even sex and marriage.

However, the sheer cost which such a massive attempt at social engineering imposed, together with the ruling regime's inability to provide "separate but equal" life opportunities to black South Africans, ultimately lead to apartheid's collapse. Urbanization continued unabated, making the notion of grand apartheid all but a fiction. And, as black South Africans became trapped in poverty, unemployment and frustrated aspirations, social protest throughout the 1960s, 1970s and 1980s triggered international condemnation, isolation and, ultimately, declining economic growth. Facing the vicious circle of international divestment, unemployment and social upheaval, F.W. de Klerk, the apartheid state's last President, lifted the ban on the African National Congress (ANC) and other popular political movements. This began a process that involved Nelson Mandela's release from prison, negotiations leading to an interim constitution and inter-party agreement on a quasi-federal constitution, democratic elections which resulted in a coalition government under the interim constitution, the operation of the democratically elected Parliament as a constitutional assembly to draft the new constitution, and the adoption of a new constitution in 1996.

Given that apartheid was justified, in part, on a federalist rationale, federalism continued to be viewed with considerable scepticism – if not outright rejection – by many of the disenfranchised during South

Africa's political transition in the early 1990s. Members of the ANC in particular saw proposals for strong regional government as a form of neo-apartheid, especially because the incumbent National Party became the most ardent champion of federalism with the onset of the transition. The ANC and its allies feared that a federal order with delegation of powers to the provinces would weaken and disperse authority considerably, thereby heavily restricting the central government's capacity to implement and consolidate mechanisms for reconstruction and development in the post-apartheid era.

The support for federalism came from a variety of quarters. Besides the National Party (NP), and the liberal democratic Democratic Party (DP), the Inkhata Freedom Party (IFP), which often projects itself as the sole custodian of Zulu political interests, also demanded a highly autonomous KwaZulu-Natal where Zulus remain the ethnic majority, and even claimed the right to self-determination. Similarly, a small group of radical, ultra-right Afrikaners clamoured for the creation of a *Volkstaat*, effectively a homeland exclusively for white Afrikaners. Indeed, the convergence – despite considerable ideological differences between these constituencies – due to their interest in autonomy resulted in a regular, informal, if odd coalition during the negotiations process to enhance the federal features of the South African constitution. Most importantly, the NP – representing the majority of whites (and increasingly "coloureds") – saw federalism, and with it a Bill of Rights, as providing an important check on the excesses of power by a new majority government.

Strongly contested and often threatening to upstage the negotiations process altogether, the impasse was finally broken by a March 1993 proposal contained in a confidential "Report to Political Parties" commissioned by the Consultative Business Movement. The proposal suggested the "34 constitutional principles" to be followed by the democratically elected Constitutional Assembly when it devised the final constitution. The most important of these included requiring each level of government (national and provincial) to have both exclusive and concurrent powers (Principle XIX), and highlighting the principle of subsidiarity, i.e., that decisions should be taken at whatever level is most "responsible and accountable" (Principle XX).

Most analysts view the South African constitution as essentially a federal one, drawing especially upon the German model of integrated federalism with framework legislation implemented by the Länder, and fairly tight integration between the central and provincial governments achieved through the Bundesrat. In other words, although the regions fully participate in policy formulation regarding the provinces, the central government has the final say.

2 CONSTITUTIONAL PROVISIONS RELATING TO FEDERALISM

The Republic of South Africa is a parliamentary democracy with the President acting both as head of government and head of state. South Africa's hybrid presidential-parliamentary system and constitution came into effect on 11 October 1996. The 1996 constitution makes a decisive break with the British-inspired principle of parliamentary sovereignty in that Parliament is subject to limitations imposed by the constitution.

The South African constitution (and especially the Bill of Rights) has been labelled as one of the most progressive in the world. It makes special provisions for a number of commissions and offices (Chapter 9). These include: the Auditor-General (s. 188); the Public Protector (s. 182); the Human Rights Commission (s. 184); the Commission on Gender Equality (s. 187); the Independent Electoral Commission (s. 190); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s. 185); and finally, the Independent Broadcasting Authority (s. 192).

The constitution establishes a federal entity of nine constituent units, namely the provinces of KwaZulu-Natal, Gauteng, Free State, Western Cape, Eastern Cape, Limpopo, North-West, Northern Cape and Mpumalanga (s. 103). Unlike most federations in deeply divided societies, the provincial boundaries are not designed to coincide with racial or tribal boundaries in recognition of the political need to escape similar past practices.

The constitution recognizes three "spheres" of government – Chapter 3 of the constitution rejected the use of the term "level of government." The formal recognition of local government as a distinct constitutional sphere in South Africa contrasts with the practice in many federations where local governments fall under the jurisdiction of the constituent units.

The 1996 constitution is designed to promote a model of cooperative federalism rather than competitive federalism. The provincial governments are therefore required to operate in accordance with the letter and spirit of the principles of cooperative government as set out in Chapter 3 of the constitution. A rigid separation of tasks and functions between the different "spheres" of government is absent – this is clearly suggested by the Council of Provinces with its confluence of national, provincial and local government interests. Nevertheless, the principle of cooperative government does not undermine provincial autonomy. For example, both Western Cape and KwaZulu-Natal provinces have exercised the right to establish their own provincial

constitutions (s. 104) with only that of the former securing approval by the Constitutional Court (s. 144). Yet, it must be acknowledged that the division of power privileges the central government, which sets national standards and norms and may over-ride provincial standards which threaten national unity or national standards. There is a very short list of "exclusive" provincial powers (i.e., abattoirs, provincial planning, roads, sport, cultural and veterinary matters). In more critical issue areas, powers are concurrent and thus either sphere can legislate, although national law again prevails in matters which cannot be effectively managed by provinces or require uniformity to be effective.

South Africa has a bicameral Parliament consisting of the National Assembly (NA) and the National Council of Provinces (NCOP), both located in Cape Town (s. 42(6)). The National Assembly consists of 400 representatives elected on the basis of proportional representation and a party list system (Chapter 4, ss. 60–72). As the democratically elected lower house, the National Assembly must ensure "government by the people under the Constitution." Somewhat unusually, the administrative and legislative bodies are located in different cities, but there is a strong possibility that Parliament will be relocated to the administrative capital of Pretoria in order to reduce the costs associated with split capitals.

The upper house was called the Senate in the interim constitution, but in the 1996 constitution it is called the National Council of Provinces. This body consists of 90 members representing the particular interests of the nine provinces and ensures that those interests are not seriously abrogated by the central government (s. 42(4)).

As far as fiscal arrangements are concerned, the provinces enjoy limited revenue-raising capabilities as well as very limited borrowing powers (s. 230). Basic rules are set out in the constitution and the *Intergovernmental Fiscal Relations Act*, first implemented in the 1999 budget. Fiscal federalism is highly centralized with distribution taking such factors into account as the needs of the national government, the effectiveness of provincial governments as well as the need to overcome income inequalities "within and among provinces" (s. 214(2)(g)). The Finance and Fiscal Commission has been created to make recommendations on the distribution of the budget (s. 220). Section 227 provides for each province to be allocated an equitable share of revenue raised nationally. Additional revenue raised by the provinces or municipalities may not be deducted from their share of revenue raised nationally or from other allocations made to them out of national government revenue (s. 227(2)).

The constitution has clear guidelines relating to the resolution of constitutional disputes (Chapter 8). In addition to the principle of coopera-

tive government, all spheres of government need to exhaust "every reasonable effort to resolve any disputes through intergovernmental negotiation" (s. 41(3)) and employ every method before approaching the courts to resolve the matter. The courts can even refer such a dispute back to the different parts of government if they consider that substantial efforts have not been made in this regard (s. 41(4)). If a court of law is unable to resolve a dispute, national legislation prevails over provincial legislation or the provincial constitution in cases where conflict over the interpretation of legislation is concerned (s. 146(3) and s. 148). Nevertheless, as the highest court regarding constitutional matters, the Constitutional Court has final say about issues involving central, provincial and local government (s. 167). It consists of a President, Deputy-President and nine other judges (s. 167(1)), and matters must be heard by at least eight judges. The Constitutional Court decides disputes between organs of the state, and on disputes relating to the constitutionality of any provincial or parliamentary bill or constitutional amendment (s. 167(4)). These matters can be brought directly to the Constitutional Court by any person, provided it is "in the interests of justice and with leave of the Constitutional Court" (s. 167(6)).

Special and rigid procedures have to be followed in order to make constitutional amendments (s. 74). Such amendments can be classified according to five categories, with different degrees of rigidity involved. Since not all of these can be described in detail here, suffice it to indicate that amendments to the entrenched powers of the constitution itself may only be amended by a bill passed by at least 75 per cent of the Assembly *together* with the support of at least six of the provinces in the National Council of Provinces. The Bill of Rights – a category two amendment – may only be amended by a minimum two-thirds in the Assembly and with the support of at least six of the provinces in the NCOP (s. 74(2)). Other amendments which (a) relate to matters affecting the NCOP or (b) alter provincial boundaries, functions or institutions or (c) amend a provision which specifically deals with a provincial matter, also require at least two-thirds support in the Assembly as well as the support of at least six of the provinces in the NCOP.

The recognition of the constitutional role of traditional leaders and the right to self-determination (s. 235) is an interesting feature of the South African constitution. The constitution recognizes that traditional authority predates the advent of European colonization of South Africa. To ameliorate the considerable tension which arises from the traditionalism of African indigenous law and its authoritarian patriarchal nature on the one hand, and the modernist, democratic and egalitarian ethos of the constitution on the other, a Council of Traditional Leaders has been established (s. 212).

Members are appointed by the Provincial Houses of Traditional Leaders as provided in Section 212(2)(a) of the constitution and are eligible for re-nomination. At the provincial level, Houses of Traditional Leaders have also been created. Nevertheless it is clear that customary law and traditional leaders are empowered essentially to perform a symbolic and advisory role and traditional leadership remains subject to Chapter 12 of the constitution.

In relation to the highly sensitive and controversial right to self-determination – largely in reaction to the ultra rightwing Afrikaners and certain constituencies within the IFP – the constitution does not preclude "recognition of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by legislation" (s. 235).

3 RECENT POLITICAL DYNAMICS

Four issues with varying degrees of constitutional developmental implications dominated the South African political debate since 2001. These issues are: the consequences of the so-called Grootboom judgement by the Constitutional Court; the constitutionality of floor-crossing legislation; the on-going saga relating to the government's policy regarding HIV/AIDS; and finally, the politicization of the government's comprehensive defence procurement program. These four issues have had varying effects on federal relations in South Africa.

On 29 May 2001, the Constitutional Court upheld a decision by the Cape High Court that the nature of South Africa's Bill of Rights compelled the state to uphold citizens' second generation (or socio-economic) rights. The home of Ms. Irene Grootboom, a member of a very poor, shack-settlement community in the Western Cape was destroyed in order to give effect to an eviction order of an unlawful settlement. The court found that the state had to act to ameliorate the plight of the many people living in terrible conditions throughout the country and within practical limits provide access to housing to citizens. The judgement has been significant in that it has created a state obligation – within certain limits – to enhance socio-economic rights. This will have a significant effect on an already financially strapped central government.

Four legislative initiatives – the *Constitution of the Republic of South Africa Amendment Act* of 2002, the *Constitution of the Republic of South Africa Second Amendment Act* of 2002, the *Local Government Municipal Structures Amendment Act* of 2002 and the *Loss of Retention of Membership Structures Amendment Act* of 2002 – sought to accommodate legally a large number

of members in the legislative assembly from switching their party affiliation, i.e., "floor-crossing."

The issue of floor-crossing is important because it has meant a shift in political power. Changes in party affiliation occurred after an earlier merger between opposition political parties, the Democratic Party (DP) and the former National Party (changed to New National Party (NNP)) to form the Democratic Alliance (DA), proved unsustainable. Instead, the NNP opted to join the ANC in an alliance, prompting one of the smallest opposition parties, the United Democratic Movement (UDM) to challenge the floor-crossing legislation in the Constitutional Court. The latter concluded that floor-crossing was not unconstitutional at the local government level but that the acts drafted at the provincial and national level were badly drafted. By rectifying these deficiencies in January 2003, a two-week grace period in April 2003 allowed representatives to cross the floor to other political parties.

This resulted in increased seats for the ANC in the National Assembly, from 266 to 275, 68.8 per cent of the total and just over a two-thirds majority. It also meant that the Democratic Alliance became the new official opposition, increasing its seats from 38 to 46. The number of seats held by the NNP dropped from 28 to 20. At the municipal level, floor-crossings in October 2002 meant the ANC gained 122 of a total number of 555 defectors from other parties (of which 417 were DA councillors) whilst 340 of the DA defectors joined the NNP. It is ironic that in all of this, the party of apartheid, the NP (which changed its name to the "New National Party" to show that it has changed) joined the ANC, the group formed in opposition to apartheid, in an co-operation pact, effectively a co-governing agreement.

Sound macroeconomic policy meant the country finally came within the 3-6 per cent inflation target range set by the Reserve Bank in 2002 and 2003, and led to the appreciation of its currency in late 2003. Yet despite some economic success, President Mbeki's reluctance to condemn openly and unambiguously President Mugabe's handling of economic and political turmoil in neighbouring Zimbabwe, as well as his failure to admit to a causal relationship between HIV and AIDS in a country with amongst the highest infection rates in the world, continued to mar his term of office. To reinforce the government's ill-defined position on HIV/AIDS, the Constitutional Court ruled in July 2002 that the government was obliged to provide anti-retroviral drugs nationally, as well as counselling and testing of women at public hospitals, and not only at the previously designated 18 pilot sites. Not only was this decision widely acclaimed by those who opposed the government's position on HIV/AIDS but also confirmed the extent to which a growing number of political matters were actively being decided by the new Constitutional Court.

Equally, if not more, controversial has been the government's decision to embark upon a R43.8 billion arms procurement package. Given South Africa's profound developmental needs, of which dealing with AIDS is a major element, this decision has been condemned by many. Since 1999, the arms deal has become one of the most politically embarrassing sagas and has tested the ANC's internal cohesion, integrity and ideological vision. In the past three years the arms procurement program has triggered allegations of massive corruption amongst top government ministers and party officials, and multiple, but ultimately aborted commissions of enquiry into both the substantial and procedural soundness of the arms procurement package. There have also been allegations by opposition parties that parliamentary opposition to the arms deal had effectively been muzzled by the ruling ANC. To muddy the waters even more, at the time of writing (November 2003) there were allegations that the Director-General of Public Prosecutions, Bulelani Nguka, was an apartheid spy, and party-affiliated businessmen are now being investigated for corruption. This controversy has divided the political community and illustrated some of the shortcomings of, and tensions within, the government. Indeed, given the continuing difficulty of managing the many internal tensions and factions within the ANC alliance, particularly in relation to labour, and the absence of any genuinely strong opposition, the ANC may succumb to a culture of patronage and corruption to retain internal party cohesion and hence thwart the emergence of a rival opposition social force.

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Table I
Political and Geographic Indicators

Capital city	Pretoria Note: Cape Town is the legislative centre and Bloemfontein the judicial centre
Number and type of constituent units	*9 Provinces:* Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo (formerly Northern Province), Mpumalanga, North-West, Northern Cape, Western Cape
Official language(s)	Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, siSwati, Tshivenda and Xitsonga
Area	1 219 090 km^2
Area – largest constituent unit	Northern Cape – 361 830 km^2
Area – Smallest Constituent Unit	Gauteng – 17 010 km^2
Total population	43 580 000 (2002)
Population by constituent unit (% of total population)	KwaZulu-Natal 21%, Gauteng 19.7%, Eastern Cape 14.3%, Northern Province (Limpopo) 11.8%, Western Cape 10.1%, North-West 8.2%, Mpumalanga 7%, Free State 6%, Northern Cape 1.8%
Political system – federal	Republic – Parliamentary System
Head of state – federal	President Thabo Mvuyelwa Mbeki (1999) African National Congress (ANC). Elected by the National Assembly to serve for a 5-year term
Head of government – federal	President Thabo Mvuyelwa Mbeki. President appoints the Cabinet
Government structure – federal	Bicameral: Parliament *Upper House* – National Council of Provinces (NCOP), 90 seats. It consists of 54 permanent members and 36 special delegates Members are elected for a 5-year term. *Lower House* – National Assembly, currently 400 seats. Representatives are elected on the basis of proportional representation and party list system (200 seats are elected from provincial lists, 200 from a national list) to serve a 5-year term. Note: at the federal level there is also a Council of Traditional Leaders. Members are appointed by the provincial Houses of Traditional Leaders.
Number of representatives in lower house of federal government of most populated constituent unit	Note: Due to election by proportional representation and the list system, representatives' constituent-unit origin is of much lesser importance.

Table I (continued)

Number of representatives in lower house of federal government for least populated constituent unit	See previous category.
Distribution of representation in upper house of federal government	Each of the 9 provinces has 10 seats.
Distribution of powers	The constitution assigns responsibilities to the national, provincial and local governments based on the principle of cooperative governance among these 3 orders of government. The federal government is responsible for maintaining national security, economic unity and essential national standards. The federal and provincial governments are concurrently responsible for 33 matters such as regional planning and development, indigenous law and customary law, school education, health, welfare and housing. In practice, the federal government determines the policy, and provincial governments are responsible for its implementation. In the event of conflict between federal and state law the former will prevail. There is a short list of exclusive provincial powers, including abattoirs, roads, sport, culture, veterinary matters.
Residual powers	Residual powers belong to the federal government.
Constitutional court (highest court dealing with constitutional matters)	Constitutional Court. There are 11 justices: 9 men and 2 women. Justices serve for non-renewable 12-year terms, but must retire at the age of 70.
Political system of constituent units	Unicameral: Legislature, consisting of between 30 and 80 members elected by proportional representation. The number of members is determined in terms of a formula set out in national legislation. (Note: Houses of Traditional Leaders have also been created. Traditional leaders perform a symbolic and advisory role.)
Head of government – constituent units	Premier, elected by the provincial legislature.

Table II
Economic and Social Indicators

GDP	US$441.6 billion at PPP (2002 est.)
GDP per capita	US$10 132 at PPP (2002 est.)
National debt (external)	US$24.1 billion (2001)
Sub-national debt	N/A
National unemployment rate	29.95% (2002 est.)
Constituent unit with highest unemployment rate	Limpopo (Northern Province) – 36.7 % (2002)
Constituent unit with lowest unemployment rate	Western Cape – 18.6% (2002)
Adult literacy rate	85.6% (2001)[1]
National expenditures on education as % of GDP	5.5 % (1998–2000)
Life expectancy in years	50.9 (2001)
Federal government revenues – from taxes and related sources	US$30.7 billion (2000–01)
Constituent units revenues – from taxes and related sources	US$8.4 billion (2000–01)[2]
Federal transfers to constituent units	US$16.2 billion (2000–01)
Equalization mechanisms	Federal transfers are based on the recommendation of the Finance and Fiscal Commission.

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Notes

1 Age 15 and above.

2 This number refers to provincial and local governments revenues. Local governments have more revenue-raising powers than provincial governments.